Supreme Court, U.S.
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91-1696

NO. A-574

IN THE SUPREME COURT OF THE UNITED STATES

DAVID B. BOWMAN, Petitioner

v.

STATE OF INDIANA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

DAVID B. BOWMAN
P.O. Box 27097
Indianapolis, IN 46227
(317) 786-4016
PRO SE PETITIONER

QUESTIONS PRESENTED

Whether an employee who has been classified by his employer as an exempt executive or administrative employee under 29 U.S.C. § 213(a)(1) of the Fair Labor Standards Act and is subject to "salary basis" treatment under 29 C.F.R. § 541.118, may be prosecuted for theft of his salary and official misconduct based on the hours on that employee's time card, when the employer knows that the time card is incorrect, and when that meployer has permitted that employee to work many uncompensated hours over forty per week.

LIST OF PARTIES

The caption set forth on the cover page to this petition sets forth all of the named parties to this proceeding.

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STATE OF INDIANA, Respondent

PETITION FOR A WRIT OF CERTIORARI
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The petitioner, David B. Bowman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Court of Appeals, Second District, entered in the above-entitled proceeding on June 26, 1991, and denied transfer to the Indiana Supreme Court on November 20, 1991.

OPINION BELOW

The opinion of the Court of Appeals of Indiana, Second District, is reprinted

JURISDICTION

The judgment of the Court of Appeals of Indiana, Second District, was entered on June 26, 1991, affirming petitioner's convictions. The Court of Appeals, Second District, denied a timely petition for rehearing on August 15, 1991. Thereafter, on November 20, 1991, the Supreme Court of Indiana denied a timely petition to transfer without opinion. On February 9, 1992, Justice Stevens signed an order extending the time for filing the petition for certiorari to and including April 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. z 1257 is the jurisdictional statute covering Supreme Court review of state court judgments.

29 U.S.C. § 207 requires the payment of mandatory overtime for hours worked by non-exempt employees when they exceed forty per week.

29 U.S.C. § 213(a)(1) is the statute which describes the bona fide executive, administrative, or professional exemption from mandatory overtime.

I.C. 22-2-1-1 is Indiana's legal workday statute, which was repealed in 1982.

I.C. 36-8-4-8 is Indiana's maximum workday and workweek for police officers.

29 C.F.R. § 541.1 is the regulation which describes the requirements to exempt an employee under the executive portion of 29 U.S.C. § 213(a)(1).

29 C.F.R. § 541.2 is the regulation which describes the requirements to exempt an employee under the administrative portion of 29 U.S.C. § 213(a)(1).

29 C.F.R. § 541.118 is the regulation which describes what salary basis means.

STATEMENT OF THE CASE

Abbreviated Facts Prior to Indictment

The saga of how petitioner,

a twenty-five year police officer who had been promoted to the merit rank of captain, who had receive fourteen letters of appreciation and commendations (Record at 1401), who was described as an excellent police officer (Record at 52, 383, 518) and a hard worker (Record at 528) who worked more than was required (Record at 527, 528), even coming into work on his days off and donating his time (Record at 1166, 1167), and who was described as being very honest, very truthful (R1069), sincere, hardworking, honest, God-fearing (R1057), trustworthy, of the highest integrity (Record at 746), and loyal (Record at 677), found himself in Marion County Superior Court, Criminal Division, charged with theft of his paycheck and official misconduct based upon the alleged theft, begins this way: at the time that the Indianapolis Police Department implemented the use of time cards in April, 1986, amid

mass confusion (Record at 532, 533, 534, 1170), petitioner held the merit rank of lieutenant. To facilitate the implementation, the Indianapolis Police Department promulgated a work rule, General Order No. 20.03 (Record at 299; Pet. App. B), designed "to ensure Departmental conformity with the requirements of the Fair Labor Standards Act;" its stated purpose was "to define and explain the provisions of the Fair Labor Standards Act as they relate to work scheduling and overtime within the Indianapolis Police Department." It defined Indianapolis Police Department officers as non-exempt [actually "partially exempt' under 29 U.S.C. § 207(k)], exempt [under 29 U.S.C. § 213(a)(1)], and appointive [also pursuant to 29 U.S.C. § 213(a)(1)]. General Order No. 20.03 (Record at 299) provided that sergeants, lieutenants, and captains would be exempt from the payment of mandatory overtime "in

accordance with their job duties" and "as those terms are defined under the Act."

Superior officers were briefed by the Indianapolis Police Department Finance Branch, receiving the following directives: no more than 160 hours could appear on the 28-day time card even if more were worked (Record at 535, 605); overtime worked could only be shown on an overtime slip (Record at 603); and there was no document on which a superior officer (sergeant, lieutenant, captain) could show that he or she had worked extra hours if not eligible for nor requesting overtime (Record at 605). Further, they were advised that non-exempt employees (e.g., secretaries) must not be permitted to begin work one minute early or work one minute past closing time or overtime would be owed to that employee.

As a lieutenant, petitioner's

supervisor permitted and even encouraged petitioner's time spent on his regularly scheduled days off to maintain a computerized study of crime trends initiated by petitioner as a management tool for more efficient allocation of manpower (Record at 1166, 1167). Petitioner did not expect compensation for this time due to his exempt status, and no compensation was furnished nor offered.

Petitioner was promoted to the rank of captain in December, 1986, and assigned as a captain for Quadrant Three, an area comprising one-fourth of the City of Indianapolis. Quadrant Three was commanded by Michael Zunk, who held the appointed rank of major.

Upon petitioner's assignment to Quadrant Three, Michael Zunk advised petitioner that he, Michael Zunk, would handle day shift, and that he wanted petitioner to handle the problems on

middle shift [approximately 1:30 to 9:30], tact shift [approximately 6:00 p.m. to 2:00 a.m.], and late shift [approximately 9:30 p.m. to 5:30 a.m.], (Record at 1243), giving petitioner supervisory responsibility for sixteen hours per day, and "on-call" responsibility for the remaining eight. Michael Zunk also advised petitioner that 7:00 p.m. to 3:00 a.m. were the preferred hours, although he had flexibility (Record at 1242). Petitioner was familiar with the job description for a captain (Record at 288; Pet. App. C), and also with the customs and practices involved with being a field captain, since he had been a patrolman in the field, a field sergeant, and a field lieutenant prior to his promotion, as well as spending approximately three and a half years as a supervisor in the Communications Branch (Record at 177) where he regularly contacted captains. Further, he

remembered an August 3, 1987 memo sent by Communications Branch Captain Charles Broeking (Record at 1016, 1097, Pet. App. D) which reminded dispatchers that field captains were not on any set work assignment.

Petitioner worked 7:00 to 3:00 for a period of disputed length (Record at 1243, 524, 552), and then discussed his perception that an officer of his rank provided no benefit on the street those hours in that area during that time of the year. The content of that discussion is disputed (Record at 1243, 1247, 1318, 1319, 472, 471, 1324, 1325), but petitioner's understanding was that Michael Zunk said, "You're the one on the street, work when you're needed." (Record at 1243, 1247).

During 1987 and early 1988, petitioner came to work between 1:00 and 2:00 p.m. (Record at 525, 561, 562, 1054, 1067, 1247) on a daily basis (Record

at 562) and maintained his availability until midnight or later (Record at 1200, 1247, 1248), thus maximizing his accessibility for problem-solving to subordinates. On one or two days per week, petitioner split his shift to work for a private employer in a capacity which he believed was approved and encouraged by the now deceased Director of Public Safety (Record at 571, 1288, 1334, 1335), characterized as the "boss of the Chief" (Record at 336), and then returned to work additional hours for the Indianapolis Police Department. Two State's witnesses testified that petitioner's actual activities at the site of the private employer would take a maximum of thirty minutes (Record at 746, 674). His long-time employment with this private employer was well-known in the Department, and petitioner never tried to hide it, meeting openly with City officials in full uniform at the private employer's site (Record

at 747, 748, 1121, 1122, 1269, 1271). The State was unable to point to any job responsibility left uncompleted (Record at 338) by petitioner as a result of the split shift, but believed that he must have shirked his duties, even though it was admitted that they had "no basis for that opinion." (Record at 340).

The Indianapolis Police Department Internal Affairs Branch and a unit of police investigators assigned to the prosecutor's office initiated surveillances to determine if petitioner was spending an uninterrupted eight hours on Quadrant Three, although remaining on Quadrant Three was never required and never suggested. The surveillances were of petitioner, his family, and his home, including viewing into his windows. After the third surveillance, and at the suggestion of the police unit assigned to the prosecutor's office

(Record at 925), Deputy Chief James Campbell advised petitioner that he was under investigation (Record at 1286, 313) for possible work hour violations. When petitioner explained what he was and was not doing, and why, Deputy Chief Campbell advised him that he knew that petitioner was working enough hours. Neither Deputy Chief Campbell nor Major Michael Zunk advised petitioner that he should stop or that his actions were, in any way, wrong or illegal (Record at 1286, 1287, 388, 514), which led petitioner to believe that they understood and agreed with petitioner. Another surveillance took place, in which it was determined that petitioner was going to continue the practice of splitting his shift to work for his private employer. As a result of the report of the investigatory team, then Chief of Police Paul Annee suspended petitioner without pay for six months. a loss of approximately

$18,000.00 which remains uncompensated, and recommended his termination (Record at 177). The Chief advised petitioner that if he did not retire, far worse things could happen to him. Since no one would explain to petitioner how his activities constituted neglect of duty, substandards performance, or violation of a rule, regulation, or law as he had been administratively charged, petitioner did not retire.

Proceedings in trial court.

On August 25, 1988, petitioner was indicted on five counts of theft, one count of attempt theft, and six counts of official misconduct (Record 2-6). He was found guilty on July 18, 1989 of one count of theft and four counts of official misconduct. (Record 149-150). The felony theft count of which petitioner was found guilty charged the following:

that David B. Bowman, on or about

> the 25th day of November, A.D., 1987 at and in the County of Marion and in the State of Indiana, did knowingly exert unauthorized control over property of the City of Indianapolis, to-wit: UNITED STATES CURRENCY, by creating or confirming the false impression that on November 14, 1987, David B. Bowman worked an eight-hour shift as a police officer of the City of Indianapolis, when in fact said David B. Bowman was absent from his assigned duties for the purpose of pursuing private employment; with intent to deprive the CITY OF INDIANAPOLIS of any part of the value or use of the aforesaid property; all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

Record at 4.

The official misconduct counts of which petitioner was found guilty alleged that on four different dates, petitioner, as a police officer of the City of Indianapolis, submitted a false or misleading record of work hours with intent to obtain UNITED STATES CURRENCY for himself.

Petitioner raised Fair Labor Standards Act arguments in the hearing on his motion to dismiss (Record at 24, 28, 29, 219, 221, 223, 224, 225). In addition, the

petitioner asked the trial court to take judicial notice of the Fair Labor Standards Act and the regulations duly promulgated thereunder, and the trial court, over the State's objection, did take judicial notice of the Act and the regulations (Record at 374-377). However, petitioner's requested instructions on there being no minimum workday and workweek for police officers in Indiana (R74; Pet. App. E), the maximum workday and workweek for police officers in Indiana (Record at 75; Pet. App. F), the meaning of "salary basis" (Record at 76; Pet. App. G), primary duty for exempt executive employees (Record at 77; Pet. App. H), required recordkeeping for exempt executive or administrative employees (Record at 76; Pet. App. I), and that the court had taken judicial notice of the maximum workday statute, the repeal of the minimum workday statute, the existence of the Fair Labor Standards

Act and regulations (Record at 82, Pet. App. J) were refused by the court over petitioner's objection (Record at 1368).

In addition, petitioner's job description (Record at 288; Pet. App. C), which shows an exempt classification, was admitted into evidence, and discussed in depth. General Order No. 20.03, the Indianapolis Police Department's work rule on compliance with the Fair Labor Standards Act, was introduced by the State (Record at 299; Pet. App. B), which argued that the Indianapolis Police Department's work rule on the Fair Labor Standards Act should guide the trial court, not the United States Code and Code of Federal Regulations, which the State, the trial court, and the Court of Appeals determined were irrelevant to a work hours violation.

Further, there was testimony from many witnesses about the Fair Labor Standards Act, the meaning of being

exempt, and the time practices of the Indianapolis Police Department, but the most significant amounts are found in the testimony of Richard Dorsey, Finance Branch captain (e.g., Record at 586, 601, 611, 615), James Campbell, Deputy Chief of Operations (e.g., Record at 300, 301, 358, 359, 363, 370, 452), and petitioner himself (Record at 1251, 1321, 1322, 1337).

Proceedings upon appeal

Petitioner included substantial argument on the question presented herein in his appellate briefs. He argued that an employee who has been exempted from the payment of overtime under 29 U.S.C. § 213(a)(1), as petitioner was, must be subject to "salary basis" treatment under 29 C.F.R. § 541.118(a), which requires that an employee receive his full predetermined salary for any week in which he performs any work without regard to the number of days or hours

worked. Since his pay as an exempt executive or administrative employee could not be tied to the hours or days he worked, he argued that his employer could not be misled or deceived into paying him his salary based on the hours on his time card. His initial brief in the Court of Appeals of Indiana, Second District, devoted pages 17-36 to a discussion of the requirements of the Fair Labor Standards Act, particularly 29 U.S.C. § 207, 29 U.S.C. § 213(a)(1), 29 C.F.R. § 541.1, 29 C.F.R. § 541.2, and 29 C.F.R. § 541.118, and the Act's application to the evidence produced at trial. He presented these arguments in his brief and his reply brief. On June 26, 1991, the Court of Appeals, Second District, affirmed Petitioner's convictions (Pet. App. A), saying:

> . . . Whether the City is in compliance with the Fair Labor Standards Act is of no consequence. . . . .

> In no event is Bowman's status or the City's compliance with the Act an issue relevant to a criminal prosecution. Bowman is not charged with violating the Act; he is charged with violating the criminal law of Indiana.
>
> The claim is Bowman violated the criminal law of Indiana by creating or confirming the false impression he worked eight specific hours for the City to obtain his pay for that eight hour period and, for the official misconduct convictions, was a public official when he created or confirmed the false impression. The issue is whether the State met its burden of proving a nexus between Bowman's pay and his time records. On this point the evidence is an officer holding the rank of captain who works less than 2,080 hours in the course of a year will not receive the annual salary for a captain.

On July 13, 1991, petitioner filed a petition for rehearing. Among the issues petitioner included was the following:

> The Court of Appeals decision that the Fair Labor Standards Act was irrelevant erroneously decides a new question of law, i.e., whether an employee who reasonably relied on his employer's classification of him as an FLSA exempt executive or administrative employee, which requires that his pay not be based upon the hours he works, can be prosecuted for theft and official misconduct based upon his work hours, because it was pertinent to whether

a crime could have occurred and whether specific intent existed.

On August 15, 1991, rehearing was denied.

On September 3, 1991, petitioner timely filed a petition to transfer and supporting brief with the Indiana Supreme Court. He included his Fair Labor Standards Act arguments. The Supreme Court of Indiana denied transfer without opinion on November 20, 1991.

REASONS FOR GRANTING THE PETITION

The Indianapolis Police Department, as petitioner's employer, voluntarily chose to classify petitioner as an executive or administrator, "as those terms are defined in the [Fair Labor Standards] Act." (Record at 299; Pet. App. B). The bona fide executive, administrative, or professional exemption is found at 29 U.S.C. § 213(a)(1) (Pet. App. K), and provides that minimum wage and overtime provisions of the Act do not apply with respect to executive, administrative,

or professional employees "as such terms are defined and delimited from time to time by regulations of the Secretary . . . . " The executive exemption is defined at 29 C.F.R. § 541.1, and the administrative exemption at 29 C.F.R. § 541.2. The job duties outlined on petitioner's job description (Record at 288; Pet. App. C) arguably qualified petitioner under either the executive or administrative exemptions, provided that he was also compensated on a "salary basis," pursuant to 29 C.F.R. § 541.118 (Pet. App. L). Section 541.118 requires that the employee receive a predetermined amount on a regular basis as part or all of his compensation without regard to the number of days or hours worked in any week where the employee does, in fact, work, and does not permit reductions in pay based upon quality or quantity of the employee's work, unless the employee is absent for a full day.

This provision has been subject to frequent interpretation by lower courts, which have uniformly held that "this particular regulation pertaining to 'salary basis' compensation must be taken to mean precisely what it says . . . . ", Craig v. Far West Engineering, 265 F.2d 251, 259 (9th Cir. 1959). In a similar vein, the Third Circuit has stated that:

> . . . salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it . . . . Paying an employee by the hour affords that employee little of the latitude the salary requirement recognizes. Brock v. Claridge Hotel and Casino, 846 F.2d 180, 184 (3rd Cir. 1988).

Petitioner was advised of his exempt classification by work rule (Record at 299; Pet. App. B), by his job description (Record at 288; Pet. App. C), and in training classes conducted by the

Indianapolis Police Department Finance Branch (Record at 534). After having been advised that he was not eligible for paid overtime due to his exempt status, and eligible for compensatory time under limited circumstances due to the FOP contract (Record at 1213), petitioner was regularly permitted to work on his days off without compensation (Record at 1166) by one supervisor, and was permitted by Michael Zunk to work from what Michael Zunk though was approximately 1:00 p.m. to midnight without additional compensation. Petitioner knew what the salary basis requirement was as a result of his classes in labor law and this was further reinforcement for his belief that the City had exempted him in good faith. Michael Zunk never told petitioner not to work the additional hours (Record at 538, 1249), and petitioner never heard anyone classify him as an hourly employee prior

to his trial. His compensation was determined by City ordinance. In addition, Michael Zunk, as petitioner's immediate supervisor, was required to sign off on petitioner's time cards prior to when they were submitted to the Finance Branch (Record at 485, 486, 498), which distributed payroll checks prior to submission of employee time cards (Record at 586). Due to petitioner's misunderstanding of the purpose of a time card for an exempt executive or administrative employee (Record at 1256, 1260), his time cards generally showed 4:00 p.m. to midnight, and Michael Zunk signed off on Petitioner's time cards prior to when he submitted them to the Finance Branch and without mentioning that the time cards were obviously incorrect. Michael Zunk testified that petitioner ordinarily came to work between 1:00 and 2:00 p.m. (Record at 525), and he believed that petitioner worked until

midnight, as the time card showed. Therefore, Michael Zunk, as petitioner's supervisor, necessarily did one of two things: Michael Zunk either permitted petitioner to work many uncompensated hours, believing that he was an hourly employee, or he also believed, as did petitioner (Record at 1251, 1337, 1252, 1256, 797, 1213, 1260) that petitioner's pay was not tied to the hours petitioner worked. At trial all witnesses agreed that petitioner was exempt, although there was much confusion among the witnesses as to what being exempt meant. For example, James Campbell testified that General Order No. 20.03 (Record at 299; Pet. App. B) was meant to be in conformity with the Fair Labor Standards Act (Record at 358), but also stated that petitioner was exempt under the definition of the Indianapolis Police Department (Record at 452), apparently under the misconception that an

employer makes that determination independent of the requirements of federal law. Richard Dorsey testified that he thought that petitioner could be both exempt, but paid on an hourly basis (Record at 596). However, "it is well settled that reasonable regulations promulgated pursuant to statutory authority have the force and effect of law . . . . When a Government official or agency lawfully prescribes rules and procedures, these are binding on the Government as well as on the citizens." Pearce v. Director, Office of Workers Compensation, 647 F.2d 716 (7th Cir. 1981).

Petitioner was convicted of knowingly exerting unauthorized control over the currency of the City of Indianapolis by creating or confirming the false impression that he worked an eight hour shift one specific day, and that he submitted false or misleading records of his work hours with intent to obtain his pay.

There was no allegation that petitioner worked fewer than 160 hours per twenty-eight day period or 2,080 hours per year as required by the FOP contract with the City (Record at 1213). The allegation was that he simply was not working the specific hours they allege they thought he was working. The State reasoned that if his time card showed 4:00 to 12:00, any time worked beyond that period was volunteered, and time petitioner was absent was noncompensable. For example, if petitioner's time card on a particular day showed 4:00 to 12:00, but, instead, he came into work at 8:30, left at 4:30, but returned at 5:00 p.m., and worked until 1:00 a.m., petitioner would be guilty of theft, due to his absence for thirty minutes between 4:00 and 12:00; petitioner, also, would not be eligible for overtime for the periods between 8:30 a.m. and 4:00 p.m., and for the hours beyond midnight.

However, even though Indiana still has a statute which limits the maximum workday and maximum workweek, I.C. 36-8-4-8, the minimum legal workday statute, I.C. 22-2-1-1, was repealed by Acts 1982, P.L. 133, Sec. 1. There is no legal requirement that any Indiana citizen work an eight hour day. In fact, many of the police officers subject to the contract (Record at 1213) relied on, do not work eight hour shifts or forty hour weeks. Further, petitioner questions whether any exempt executive or administrative, whose pay necessarily may not be tied to the hours he works, 29 C.F.R. § 541.118, can be required to work an eight hour day unless his or her job can only be properly completed during that specific eight hour period. Petitioner's job description said "varying shifts," and he was the only field captain for that area of the City twenty-four hours per day. His responsibilities

were not limited to a specific eight hour period, and he was routinely called out to handle quadrant matters occurring during other time frames. It is petitioner's position that the lower court's decision that the Fair Labor Standards Act was irrelevant erroneously decides a new question of law which is either totally dependent on federal wage and hour law, or so interwoven that it cannot be separated from federal wage and hour analysis: whether an employee who reasonably relied on his employer's classification of him as exempt under 29 U.S.C. § 213(a)(1), which requires that his pay not be tied to the hours he works, can be prosecuted for theft and official misconduct based upon his work hours. Certainly the Fair Labor Standards Act was pertinent to the determination of whether crime could have occurred or whether specific intent existed. To conclude otherwise is to exempt Indiana

from compliance with federal law.

Importance of this decision: the City of Indianapolis views petitioner's case as authority for the correctness of its wage and hour interpretation. While no other police employee has been prosecuted since petitioner, both a sergeant and lieutenant were suspended without pay for similar behaviors. The lieutenant stopped at his private employer's workplace which is in the same area that the lieutenant works for the City, to pick up his paycheck, which did not interfere in any way with his Departmental duties.

There <u>has</u> been a message sent by this decision: the message is that an employer has no legal obligation to comply with federal laws or regulations the employer dislikes, unless sued into compliance by an employee with sufficient knowledge that a cause of action may exist, the financial resources with

which to pursue that lawsuit, and the fortitude to sue an employer for whom he or she needs and wants to continue to work to make a living. In respect to wage and hour law specifically, this decision provides employers a state criminal law means by which employers can circumvent their responsibilities to comply with applicable wage and hour legislation. Since it has worked for the City of Indianapolis, it is to be expected that other governmental units will also try this approach, and there is no reason to conclude that it will be limited to Indiana.

One need only shepardize 29 U.S.C. § 213(a)(1) or 29 C.F.R. § 541.118 to discover that governmental bodies remain unwilling to accept that Congress intends that governmental employees be protected by the remedial provisions of the Fair Labor Standards Act. In what seems like a never-ending effort to avoid

compliance, governmental units devise policies designed to avoid the blatantly simple requirements of 29 C.F.R. § 541.118. For example, less than two months after this Court denied certiorari in Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. den., 111 S. Ct. 785 (1991), the San Diego County Board of Supervisors amended its compensation ordinance to provide that employees subject to the salary basis treatment would be paid for absences from work of less than a day, but only if they had no leave time available, and then made leave time available in increments as small as one-tenth of an hour. Service Employees Int'l Union, Local 102 v. County of San Diego, No. 90-1211-GT-M, 1992 U.S. Dist. LEXIS 2156, (S.D. Cal. 1992). See also John J. Hilbert, Jr. v. Dist. of Columbia, No. 90-2973, 1992 U.S. Dist. LEXIS 1946, 30 Wage

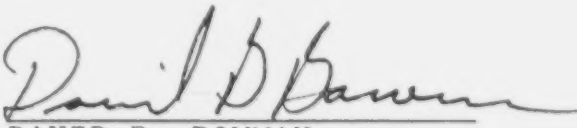
& Hour Cas. (BNA) 1263 (Dist. D.C. 1992).

Private sector employers subject to the regulations have adjusted by utilizing more efficient personnel allocation and management, and have accepted the fact that an employer's desire to avoid overtime payments is an insufficient reason to exempt an employee. The same can and should be expected of public sector employers.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,



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APPENDICES

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APPENDIX A
OPINION OF THE COURT OF APPEALS
OF INDIANA, SECOND DISTRICT

IN THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT

DAVID B. BOWMAN, Appellant-Defendant,	)	
V.	)	NO. 49A02-8911-CR -00583
STATE OF INDIANA, Appellee-Plaintiff.	)	

APPEAL FROM THE
MARION COUNTY SUPERIOR COURT ONE
The Honorable John Tranberg, Judge
Cause No. 49G01-8808-CF-091389

SHIELDS, P.J.

MEMORANDUM DECISION

David B. Bowman appeals his convictions of theft and four counts of official misconduct.

We affirm.

FACTS

David B. Bowman joined the Indianapolis Police Department on October 7, 1963. Subsequently, he became employed

on a part-time basis by Melvin Simon & Associates. In December, 1986 Bowman was promoted to the merit rank of Captain and assigned as a field captain for Quadrant Three on the 7:00 p.m. to 3:00 a.m. shift. Bowman worked those hours for some time and then received permission to work from 4:00 p.m. to midnight. He frequently came to work around 1:30 or 2:00 p.m. and was "on the air" until at least midnight.

The Department implemented time records in April, 1986. At all relevant times, Bowman reported his hours to the City as from 4:00 p.m. to midnight although during some of these hours he was also working for Simon & Associates. Bowman was indicted on five counts of theft, one count of attempted theft and six counts of official misconduct. He was convicted on one count of theft and four counts of official misconduct. The theft conviction was based on a

count alleging the City relied on Bowman's time card showing an eight-hour shift to pay him; the official misconduct convictions were based on counts alleging essentially the same conduct.

ISSUES

1. Whether the trial court erred in overruling Bowman's motion to dismiss the indictment for failure to state an offense.

2. Whether the evidence is sufficient to sustain his convictions.

3. Whether the trial court erred in refusing four of Bowman's tendered final instructions.

4. Whether Bowman's sentences are manifestly unreasonable.

I.

Bowman claims the trial court erred in denying his motion to dismiss the subject indictment because the indictment failed to state an offense.

Bowman's motion to dismiss the

indictment did not claim the indictment was facially defective. Rather, he alleged facts outside the face of the indictment that he claimed negated his commission of a crime. His theory was the City could not have been deceived by the hours appearing on his time record because his pay was not based upon the hours he worked and because a false impression cannot be created in the mind of a corporation.

Ind. Code 35-34-1-4 (1988) provides for dismissal of an indictment if the "facts stated do not constitute an offense." IC 35-34-1-4(a)(5). Any defect in the State's case involving the manner in which Bowman's pay was determined could not be reached by a motion to dismiss. A motion to dismiss which alleges the charging document does not state an offense necessarily assumes the truth of the facts alleged for the purpose of the motion. The manner in

which Bowman's pay was determined was neither alleged nor did it constitute a necessary allegation. Therefore, it could not constitute a facial defect in the indictment. Because a facial defect was not otherwise asserted, the trial court properly overruled Bowman's motion to dismiss based upon the manner by which his pay was determined.

Bowman's argument the indictment should have been dismissed because a false impression cannot be created in the mind of a corporation is based upon Doyle v. State (1984), Ind. App., 468 N.E.2d 528. Doyle holds that a corporation, distinct from a human director or shareholder, does not have a "mind" of its own to be deceived. As with Bowman's claim the indictment should have been dismissed because of the method by which he was paid, so, too, whether there was a human who was deceived while acting on behalf of the City of

Indianapolis is a matter of proof at trial and could not be reached by his motion to dismiss.

II.

Bowman argues the evidence is insufficient to support his convictions. Bowman was convicted of one count of theft and four counts of official misconduct. The theft count alleged Bowman exercised unauthorized control over currency belonging to the City by creating or confirming the false impression he worked an eight-hour shift. Bowman's convictions for official misconduct were based upon allegations Bowman submitted false or misleading records of work hours with the intent to obtain currency. Hence, for both theft and official misconduct the State had the burden of proving beyond a reasonable doubt that Bowman was paid by the City based upon his reports of the hours he worked. Bowman claims the State

did not and could not meet htis burden because the City of Indianapolis had to pay Bowman regardless of whether he worked the hours as reported on his time record.

Pursuant to the provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1982), as amended, Pub.L. 99-150 (1985), the Indianapolis Police Department issued General Order No. 20.02 on April 17, 1986, effective April 19, 1986. Section III (B) of the order states, in relevant part: "[I]n accordance with their job duties, employees in the ranks of sergeant, lieutenant, and captain are exempt from coverage under the Fair Labor Standards Act as executives or administrators, as those terms are defined under the Act."

Bowman claims that, as a field captain, he fell within the definition of an executive. 29 C.F.R. § 541.118(a), promulgated pursuant to the Act, provides

an employee, classified as an executive, receives "each pay . . . a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided . . . the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 C.F.R. § 541.118(a). Consequently, Bowman argues that even though the evidence shows he performed services for another employer during some of the hours he reported on his City work reports, he was entitled to his salary.

Whether the City is in compliance with the Fair Labor Standards Act is of no consequence. That is a question for the civil courts or administrative proceedings. If, in fact, Bowman is not an executive as that term is defined

by the Act and the applicable regulations, he has a remedy against the City. In no event is Bowman's status or the City's compliance with the Act an issue relevant to a criminal prosecution. Bowman is not charged with violating the Act; he is charged with violating the criminal law of Indiana.

The claim is Bowman violated the criminal law of Indiana by creating or confirming the false impression he worked eight specific hours for the City to obtain his pay for that eight hour period and, for the official misconduct convictions, was a public official when he created or confirmed the false impression. The issue is whether the State met its burden of proving a nexus between Bowman's pay and his time records. On this point the evidence is an officer holding the rank of captain who works less than 2,080 hours in the course of a year will not receive the annual

salary for a captain. The officer is expected to work "[f]orty hours a week, 2,080 hours a year." Record at 581. The finance office captain stated those hours were the "basis for the pay that [he paid] out from the finance department" for any rank from captain and below. Record at 581. The captain continued:

> When the card comes in if we find that it did not come up to 160 hours then we would do one of two things, it would depend upon whether it was overpaid or underpaid . . . . Now if an officer--often times due to transfer from one division to another and that will throw off the schedule so he may only come up with a 152 hours and we paid him for a 160. In that case we would require the officer to either take a bonus day, a vacation day, if he has one available, if he has no available days to take for that extra day that we've paid him that he did not work, then we would, on one of the following checks coming up, we would take the eight hours and only pay him seventy-two instead of eighty.

Record at 587.

> Q. In other words, if they're not made they don't get paid or they will get paid but then you're

going to come back and deduct it (unintelligible), is that right?

A. That's correct. If I don't get a time card from somebody, that I've already paid for, I'm going to be looking for that person to make sure they're still working on it.

Record at 590.

A reasonable fact finder could conclude from this evidence that Bowman would not have been paid, or would have had sums withheld from his pay in the event of an overpayment, without the time records which reported Bowman was working for the City at the same time he was being compensated for services performed for another meployer.

An employer has the right to designate the hours for which an employee will be compensated. Here the evidence is Bowman was scheduled for a shift from 4:00 p.m. until midnight. Therefore, whether he reported early is not relevant. The City also has the right

to require its employees to work exclusively for it during duty hours, as it did here. Consequently, whether Bowman's employment with his other employer interfered with the performance of his police duties is imilarly not relevant to the narrow issue before us.

Bowman's other arguments, that he believed his other employment was approved and encouraged; that had he intended to commit theft from the City he could have claimed sick leave during the hours of his dual employment; and that his supervisor knew his time records were inaccurate because the supervisor knew Bowman reported early are arguments that implore this court to reweigh the evidence and judge the credibility of the witnesses. We will not do so.

In conclusion, the evidence is sufficient to sustain Bowman's confiction for theft. It is similarly sufficient to sustain his convictions for official

misconduct in that he performed an unlawful act, submitted false or misleading records of work hours on days alleged in the counts, with intent to obtain currency, i.e., he committed several acts of theft.

III.

Bowman claims the trial court erred in refusing four of his tendered final jury instructions. His tendered instruction number six would have advised the jury

> There has been evidence introduced during this trial that the Department [sic] may have violated certain rules, regulations, or General Orders of the Indianapolis Police Department. These are rules of the Police Department and are not laws not [sic] of the City of Indianapolis or State of Indiana and violation of one or more of these rules, regulations, or General Orders would not be a crime.

Record at 66.

The trial court properly refused this tendered instruction. First, the proposed instruction, referring to the Departments'

violation of Department rules, etc. is confusing. In addition, the trial court instructed the jury as to the definitions and essential elements of the crimes of theft and official misconduct; it was unnecessary to instruct the jury as to what conduct was not included within the definitions and elements.

Bowman's tendered instruction number seven, "[t]he threshold question in a case alleging theft is whether the Defendant's control over the money was unauthorized and whether the Defendant knew his control was unauthorized[,]" Record at 67, was covered by the court's final instructions numbered 8 and 14 which set forth the elements of theft and specifically defined "unauthorized" control.

Bowman's tendered instruction number sixteen read: "An employee paid on a salary basis receives each pay period

a predetermined amount constituting all or part of his compensation without regard to the number of days or hours worked." Record at 76. Bowman argues the trial court erred in refusing the instruction because it accurately recites 29 C.F.R. § 541.118(a)(1). As we previously held, Bowman's status and that of the City under 29 C.F.R. § 541.118(a)(1), a regulation promulgated under the Federal Labor Standards Act, is of no consequence. For the same reason the trial court did not err in refusing his tendered final instruction number eighteen which set forth the records which must be maintained for exempt executive employees under 29 C.F.R. § 516.3.

The trial court properly refused Bowman's tendered final instructions numbered six, seven, sixteen and eighteen.

IV.

Bowman claims the trial court erred

in admitting into evidence the State's Exhibits 13, 14 and 15. Bowman fails to cite to the record where these exhibits were offered, to his objection, or to the trial court's ruling. Therefore, we deem the issue waived.

V.

Bowman claims his sentences are manifestly unreasonable. He received the presumptive sentence on the felony count. The sentence was suspended and probation ordered. In addition, Bowman was fined $1,000.00. On the misdemeanor counts Bowman received one year suspended, with probation. All sentences were ordered concurrent to one another.

As Bowman acknowledges, a sentence will not be declared manifestly unreasonable unless no reasonable person could find the sentence appropriate to the offense and offender. A presumptive sentence is not manifestly unreasonable

as a matter of law.

Judgment affirmed.

GARRARD, J. CONCURS.

SULLIVAN, J., CONCURS.

APPENDIX B
GENERAL ORDER NO. 20.03
FAIR LABOR STANDARDS ACT
ISSUED: April 17, 1986
EFFECTIVE: April 19, 1986

THIS GENERAL ORDER SUPERSEDES GENERAL ORDER NO. 1.06, EFFECTIVE DATE OCTOBER 23, 1985, AND GENERAL ORDER NO. 20.02, EFFECTIVE OCTOBER 23, 1985.

I. PURPOSE

The Fair Labor Standards Act establishes minimum wage, overtime pay, equal pay, record keeping, and child labor standards affecting a wide range of full-time and part-time workers throughout the nation. The purpose of this order is to define and explain the provisions of the Fair Labor Standards Act as they relate to work scheduling and overtime within the Indianapolis Police Department.

II. POLICY

All members of the Indianapolis Police Department shall comply with the following procedures to ensure

Departmental conformity with the requirements of the Fair Labor Standards Act.

III. OFFICERS COVERED BY THE ACT

Under the provisions of the Fair Labor Standards Act (FLSA), some employees may be excluded from its coverage. In accordance with these provisions, the following classification of employees has been established by the Indianapolis Police Department.

A. Non-exempt employees: Employees in the ranks of patrol officer, probationary officer, and recruit trainee are non-exempt employees, and they are subject to all FLSA regulations pertaining to law enforcement agencies.

B. Exempt employees: In accordance with their job duties, employees in the ranks of sergeant, lieutenant, and captain are exempt from coverage under the FLSA as executives or administrators, as those terms are defined under the Act. Work scheduling and overtime for

exempt employees shall be administered as discussed below.

C. Appointive employees: Employees in the appointive ranks of major and above are also exempt employees. Rules pertaining to work scheduling and overtime for appointive employees are outlined below.

IV. REQUIREMENTS OF THE ACT AS THEY PERTAIN TO NON-EXEMPT EMPLOYEES

A. Non-exempt employees must be paid for all hours worked in a work period. In general, "hours worked" includes all time an employee must be on duty. Also included is any additional time the employee is suffered or permitted to work.

B. Under the FLSA, overtime for non-exempt employees must be paid at a rate of at least 1½ times the employee's regular pay rate for each hour worked in a work period in excess of the maximum allowable in a given type of employment.

Generally, the regular rate includes all payments made by the employer to or on behalf of the employee (excluding certain statutory exceptions such as clothing allowance).

V. WORK HOURS AND WORK PERIODS FOR NON-EXEMPT EMPLOYEES

A. The established work period for non-exempt officers is twenty-eight (28) days, with a bi-weekly pay period. In accordance with the FLSA, officers shall be compensated at time and one-half for actual hours worked in excess of 171 hours in the twenty-eight (28) day work period. Other overtime worked shall be compensated in accordance with the IPD-FOP Memorandum of Understanding and is considered "gap time" overtime. All other hours shall be compensated at straight time.

Calculations of time worked at time and one-half shall be made in terms of the twenty-eight (28) day work period,

not on a daily or weekly basis. Calculations for gap time overtime shall be made on the work day or work week basis.

B. "Hours worked" includes all time the officer is on duty. Thus, all hours within an eight (8) hour shift, mealtime (not to exceed thirty (30) minutes) are considered hours worked. Also considered hours worked are approved overtime; actual court time, including travel time to courts at one hour (if the officer's shift does not begin or end within one (1) hour of the court session); mandatory training time in Marion County; mandatory training time outside Marion County which occurs during the officer's regularly scheduled hours on both working and non-working days; time spent at the firing range if required by the Department; and time spent in branch meetings, coroner inquests, merit board hearings, review board hearings, internal affairs investigations, and

required Departmental medical examinations.

Not considered hours worked are: on-call time if the officer possesses a beeper or other communication device; unpaid suspension time; and personal time relating to attendance at commendation ceremonies and participation as a candidate in promotional and other selection processes.

Additionally, not included in hours worked for FLSA calculations are vacation hours, sick leave, bonus days, or any other paid non-working time. Under the IPD-FOP Memorandum of Understanding, the Department also retains the discretion to make similar adjustments for gap time calculations. Thus, court time under two hours and paid sick leave may not be included in gap time payment calculations.

Thus, "hours worked" is not the same as "hours paid."

C. To insure all officers are

compensated at an appropriate annual rate, it is the responsibility of the branch commander, with the approval of the divisional commander and the Chief of Police, to establish specific work schedules related to duty assignments. These schedules shall average 160 hours per twenty-eight (28) day work period. The normal meal time shall not exceed one half hour unless approved by the appropriate authority.

D. The branch commander, with the approval of the divisional commander, may make some modification to an officer's work schedule or work hours during a work period to ensure adequate coverage of assignments and to reduce the Department's overtime liabilities and expenses. However, the officer shall be given at least five (5) calendar days written notice of the schedule change, unless otherwise approved by the divisional commander.

E. Statements regarding normal work hours, days, and periods are intended to describe normal conditions only. These statements are not a guarantee of hours to be worked nor a description of abnormal conditions. The normal work period is 160 hours in a twenty-eight (28) day period.

VI. OVERTIME FOR NON-EXEMPT EMPLOYEES

A. FLSA Overtime: As discussed above, officers shall be compensated at time and one-half for actual time worked in excess of 171 hours in a twenty-eight (28) day work period. Effective April 19, 1986, all such overtime shall be compensated in cash rather than time back.

B. Gap Time Overtime: For the remainder of 1986, officers shall be compensated at time and one-quarter for gap time overtime. In 1987, gap time overtime shall be compensated at time and one-half. The officer may

elect to receive compensation in either cash or time back for gap time overtime by checking the appropriate box on the overtime voucher. However, the Department reserves the option to pay the officer at the end of the year for accumulated overtime above 40 hours. Accumulated overtime on the books may be taken by the officer at any time during his career, with approval of the branch commander and upon completion of the appropriate form.

C. Calculation of pay and time back for hours worked beyond an officer's normal schedule will be made at the end of each twenty-eight (28) day work period. Payment will be made on the first administratively possible paycheck. An officer's accumulated overtime account will be credited with any earned accumulated overtime at the end of the 28 day period. The officer must advise the Finance Office of any errors in

the calculations within thirty days of monetary payment or accumulated overtime credit.

D. Calculation of an officer's rate of pay for gap time overtime shall be made by dividing 2080 hours into base salary of the officer's merit-rank.

Calculation of an officer's rate of pay for computation of FLSA time and one-half (hours worked in excess of 171 in a twenty-eight (28) day period) shall be made by dividing 2080 hours into the sum of the officer's base salary, plus educational pay, longevity pay, special position pay, car duty pay, and shift differential pay. Not included in the officer's FLSA rate is the extra compensation (i.e., ½ time in 1986 and ½ time in 1987) provided to the officer for gap time overtime.

The FLSA does allow an employer to recalculate an employee's hourly rate based on the total number of hours

worked in a work period. Under this provision, pay rates can vary depending on overtime worked, and the more overtime an officer works, the lower his/her hourly rate of pay. Although this recalculation would save some overtime costs, the Department has decided to pay overtime at the officer's rate of pay as outlined above rather than reduce that rate during periods overtime is worked.

The FLSA also allows the employer to offset its FLSA overtime liabilities with overtime paid for non-FLSA overtime hours. Thus, extra compensation (¼ time in 1986 and ½ time in 1987) paid for gap time overtime will be credited toward the amount owed to the officer for FLSA overtime.

None of the above calculations has any bearin on pension calculations or benefits.

E. The Department has the right to require overtime work when the needs

of the Department require it. However, overtime work is allowed only when approved in advance by the branch commander. Overtime work as a regular practice is not permitted. Overtime shall be closely monitored by the branch commander, divisional commander, and Finance Office.

VII. RECORD KEEPING UNDER THE FAIR LABOR STANDARDS ACT

A. The FLSA requires that employees must be paid for all hours worked, including fractional parts of an hour. Thus, the Department is required to keep accurate records of time worked by its employees. To assist in this record keeping process, a time sheet must be completed for each employee during the twenty-eight (28) day period.

B. The time sheet will specify actual regular hours worked in a day (not including court time and overtime which shall be recorded on separate forms). It also will indicate leave

time (and unpaid leaves) taken.

C. Because the FLSA requires careful recording of hours worked, hours shall be registered in quarter (¼) hour increments. If the officer works for eight (8) or more minutes of a fifteen (15) minute period, he shall receive compensation for that period.

D. The officer and his supervisor shall be required to verify the accuracy of the time sheet by signing it at the end of the period. The branch commander shall review and initial all time sheets for personnel in his branch.

E. Time sheets shall be submitted to the Finance Office no later than Monday of the week following the end of the twenty-eight (28) day work period.

F. Time sheets that are lost should be reported immediately to the Finance Office so new records can be prepared.

G. Intentional mutilation or falsification of time keeping records shall

be considered a violation under Section II of the Department's Rules and Regulations and may subject the employee to disciplinary action.

H. Paychecks cannot be issued without a properly completed time sheet. The superior officer will be responsible for insuring that the sheet is properly completed, signed by both the employee and himself, and available for presentation at the end of each 28-day period. It will be the responsibility of the branch commander to pick up the time sheets and deliver them to the Finance Office.

VIII. WORK SCHEDULING AND OVERTIME FOR EXEMPT EMPLOYEES

Exempt employees in the ranks of sergeant, lieutenant, and captain generally will be compensated for overtime in accordance with the IPD-FOP Memorandum of Understanding. However, for the remainder of 1986, sergeants shall be

compensated for overtime in the same manner as outlined above for non-exempt employees. Thus, with the exception of sergeants in 1986, the following provisions shall apply to exempt employees:

A. 1986 (Except Sergeants): All overtime shall be compensated at time and one-quarter.

B. 1987: All overtime shall be compensated at time and one-half.

C. Exempt employees shall be given the option of being compensated for overtime in either pay or time back (except for FLSA overtime for sergeants in 1986). The desired method of compensation shall be noted on the overtime voucher prior to its submittal to the Finance Office. Overtime compensation made in time back shall be credited to the officer's total of accumulated time at the end of each twenty-eight (28) day period.

D. Calculations for paid overtime

shall be made by dividing 2080 hours into the base rate of pay for the officer's merit rank except for FLSA overtime for sergeants in 1986.

E. Exempt employees shall be required to complete a time sheet as outlined in Section VII.

F. Exempt employees who are assigned a take-home car shall not be eligible for paid overtime except in extraordinary circumstances as approved by the Division Commander.

IX. WORK SCHEDULING AND OVERTIME FOR APPOINTIVE EMPLOYEES

A. Appointive employees are considered salaried employees and generally are not compensated for overtime hours worked in a work period.

B. Compensatory time back at straight time may be granted for leave time required to be worked (i.e., vacation required to be worked) by an appointive employee. This compensation must

be approved by the Chief of Police.

C. Although appointive employees are not required to complete a time sheet as discussed above, they shall be expected to complete the appropriate forms in utilizing leave benefits.

Distribution:

All Division and Branch Commands
All Sworn Police Personnel (Manual Insert)
Planning and Research

Rules & Regulations: Section I,A
IX,B

General Order No. 20.03
Fair Labor Standards Act

APPENDIX C

IPD JOB DESCRIPTION FOR FIELD CAPTAIN

Operations Divison

Team Policing Quadrants

% TIME CRITICAL TASKS:

10% 1. Coordinates, oversees and participates in deployment of personnel on quadrant; meets with commander to identify staffing needs throughout quadrant; discusses needs with field lieutenants to plan and organize shift activities; reviews crime information sheets and field activities with lieutenants to assess operational concerns; monitors, coordinates, and approves schedules and assignments; insures personnel, equipment, and vehicles are available to meet assignment needs; submits plans to commander for coordination with

other quadrant operations.

10% 2. Provides direction to quadrant personnel; issues written and verbal commands to advise personnel of actions to be taken; insures directives are clearly stated, consistent with Departmental policy, complete, timely, and issued to appropriate personnel; uses control and follow-up to verify directions are carried out; assists in creation and implementation of policy, standards and goals for quadrant.

8% 3. Participates in development of plans to insure high level of morale and motivation on quadrant; meets with commander to review and discuss morale and motivation issues; provides direction to field supervisors in developing support and

cooperation among officers; oversees resolution of problems, conflicts, or grievances presented by quadrant personnel.

10% 4. Monitors establishment of positive relations between quadrant personnel and community; meets with quadrant personnel, administrative personnel and members of public to identify concerns and develop community relations efforts; directs development of rapport between officers and citizens, businessmen, representatives from neighborhood organizations, etc.

10% 5. Oversees quadrant personnel in performance of law enforcement and service duties; insures awareness of activities by patrolling quadrant and

maintaining contact with Communications; monitors field operations of quadrant personnel by reporting to variety of incident scenes; provides direction and assistance at scenes, as appropriate; may take police action, if needed (investigation, pursuit, apprehension, arrest, evidence collection and protection, etc.)

8% 6. Responds to scenes of major incidents (police action shootings, injured officers, bomb threats, hostage situations, major accidents, disasters, etc.); directs activities in accordance with General Orders; calls for additional units as needed; coordinates activities with other Departmental units and other agency personnel.

5% 7. Prepares reports (operational, special, administrative and analytic) relating to activities in accordance with General Orders; observes and records events; completes or composes reports; checks reports for accuracy and completeness; submits reports to appropriate personnel; maintains personal notebook of activities.

5% 8. Evaluates and counsels quadrant personnel and/or reviews evaluations ocmpleted by field supervisors; advises personnel of performance standards set by Department; observes activities to obtain specific examples of performance; reviews available data (radio runs taken, reports and arrests made, times out of

service, etc.) to determine productivity levels; assesses and documents performance, using both formal evaluation forms and less structured methods; monitors evaluations submitted by field supervisors to maintain consistency throughout quadrant; discusses evaluations with commender to insure conformity with others in division; provides counseling to subordinates, advising of strengths, weaknesses, importance of proper performance, and methods for improvement; follows-up on counseling session to insure performance is corrected; recommends commendations as warranted by performance.

5% 9. Monitors disciplinary control of quadrant personnel; develops

positive discipline by serving as role model and insuring field supervisors maintain atmosphere needed for good performance; explains Departmental policies and rules to insure compliance; enforces rules in fair and impartial manner; recognizes rule violation and/or misconduct upon occurrence; takes prompt corrective action (counseling, retraining, formal discipline) or reviews actions taken by field supervisors in accordance with Departmental policy; documents and maintains records to substantiate disciplinary actions; follows-up on action to determine if behavior is corrected; advises commander of disciplinary issues to insure conformity

with others in Divison.

10% 10. Meets with variety of other Departmental/agency personnel to discuss issues of mutual concern and to develop long- and short-range plans and programs; assists in identification of program objectives; particpates in analysis and evaluation of situation; aids in identification and evaluation of alternative solutions; provides input into selection of best alternative; assists in implementation of plans, presenting and explaining programs to field personnel; participates in monitoring program to control and evaluate results.

3% 11. Directs supervisory investigations of special incidents (subordinates' use of firearms

and other force, injured officers, citizen complaints, vehicle accidents, equipment damage or loss, etc.); coordinates investigations between field supervisors, Departmental personnel, and other agency representatives; gathers data or oversees gathering of data relating to incident; reviews, establishes, and determines facts of incident; forwards recommendations and results of investigation to appropriate personnel for further action.

2% 12. Oversees instruction of personnel on quadrant; meets with commander to identify instructional needs and develop training plans; insures explanation of new policies and procedures is provided to

shift personnel; oversees provision of remedial instruction as needed to advise personnel of methods for improving performance; insures personnel attend in-service training as scheduled; recommends voluntary training programs; may lecture at Academy or formal education institutions.

2% 13. Monitors reports submitted by personnel on shift; checks reports for accuracy, completeness, and compliance with orders; initials reports and insures submittal to appropriate personnel; discusses reports with field lieutenants and advises of needed revisions; insures officer completing report is informed of necessary corrections and methods to follow in future.

2% 14. Oversees roll call sessions conducted by field lieutenants; insures attendance roster is verified against actual personnel present and notifications are made; insures administrative and operational information is disseminated with explanation and clarification.

2% 15. Oversees inspections of personnel, facilities, equipment, and supplies conducted by field supervisors; insures conformity with Departmental policy and procedures on quadrant-wide basis; discusses inspection results with commander to develop corrective measures.

2% 16. Monitors time keeping records submitted by personnel to insure adequate staffing of quadrant; reviews leave

requests with commander and field lieutenants, checking requests against projected shift needs, staffing levels, and other officers' requests for time off; submits request to appropriate personnel for final approval and recording; insures officer is advised of status of request (approved/ denied).

2% 17. Assist commander in preparation of annual budget request; consolidates field supervisors' recommendations for suggested purchases and submits to commander for approval.

1% 18. Attends court to present testimony and/or monitor quadrant personnel participation in proceedings.

1% 19. Maintains uniform, equipment, and weapons in accordance

with General Orders; maintains supply of forms and reports needed to perform duties; insures vehicle is kept in good working order.

1% 20. Attends training sessions (operational, administrative, and managerial) to obtain information and maintain compliance with Departmental standards.

1% 21. Performs other duties as directed.

WORKING CONDITIONS:

Varying shift with weekends off (works every fourth weekend as duty captain); field conditions; exposure to extreme weather conditions, armed and/or dangerous persons, arrest of felons, individuals with contagious diseases, and hazards associated with emergency driving.

MAJOR WORKER CHARACTERISTICS:

A. Knowledge of: 1) Indianapolis

Police Department Rules and Regulations; 2) Indianapolis Police Department General Orders Manual; 3) basic administration; 4) management; 5) supervision; 6) program and policy development; 7) manpower deployment and allocation; 8) theories and methods of planning, organizing, and directing; 9) work scheduling; 10) methods and procedures of discipline; 11) evaluation methods and procedures; 12) theories of employee motivation; 13) budgeting procedures; 14) instructional methods; 15) Department structure and functions; 16) functions of City agencies; 17) law enforcement theories, methods and procedures; 18) patrol theories, methods, and procedures; 19) criminal, traffic, and juvenile laws; 20) laws and procedures of search and seizure, arrest, interrogation and confession, evidence, and crime scene protection; 21) court policy and procedures; 22) officer safety procedures; 23) law enforcement information systems

(IDACS and NCIC); 24) juvenile delinquency; 25) crime analysis; 26) crime prevention; 27) community relations; 28) community service agency functions; 29) crisis intervention; 30) first aid; 31) City geography; 32) defensive driving techniques; 33) interview and counseling procedures and methods; 34) police report writing; 35) firearms responsibility; 36) police radio procedures.

B. Ability to: 1) define and analyze problems, collect data, establish facts, and draw complex conclusions; 2) analyze problems quickly and take appropriate action under stress; 3) handle sensitive and hostile public contacts; 4) provide effective leadership 5) observe and record events accurately and completely; 6) communicate effectively, both orally and in writing; 7) compose and edit detailed reports.

C. Skills in operation of: 1) automobile under emergency conditions; 2)

issued equipment and weapons.

D. Other requirements: 1) maintenance of physical condition needed to effect arrests, subdue resisting individuals, chase fleeing suspects, lift and carry equipment and injured persons, force entry into building, climb flights of stairs, scale fences, stand or sit for long periods of time, endure exposure to extreme weather and disease, perform life saving procedures (CPR, etc.); 2) effective audio-visual discrimination and perception; 3) maintenance of mental alertness needed to observe activities and implement appropriate action; 4) emotional and psychological stability.

FLSA CLASSIFICATION: EXEMPT

DATE PREPARED: MAY 1987

APPENDIX D
IPD INTERDEPARTMENT COMMUNICATION

To All Telecommunicators

From Capt. Chas. E. Broeking

Subject Quadrant Field Captains

Date Aug. 3, 1987

It has been brought to my attention, from some of the Field Captains, that they are not being contacted in the field when they are in fact on duty.

The Field Captains are not on any set work assignment, and may be working any shift. Even though the slate may show the Quadrant Captain working a specific shift, if there is traffic for the Captain, make every effort to contact him on his respective channel.

On the weekends the Duty Captain also has a pager on which he may be contacted.

Keep in mind that Field Captains are not required to mark in or out of service and may be available, although they do not appear "on duty" in the computer.

APPENDIX E
PROPOSED INSTRUCTION 14

There is no law requiring a minimum workday and minimum workweek for police officers.

AUTHORITY: I.C. 22-2-1-1 (repealed)

29 U.S.C. § 201, et seq.

Given _____

Refused ✓

Modified _____

APPENDIX F
PROPOSED INSTRUCTION 15

Under the law of Indiana, police officers may not be required to work more than six days of eight hours each in one week, or more than an average of forty-eight hours per week in one year.

AUTHORITY: I.C. 36-8-4-8(a)

Given ____

Refused ✓

Modified ____

APPENDIX G
PROPOSED INSTRUCTION 16

An employee paid on a salary basis receives each pay period a predetermined amount constituting all or part of his compensation without regard to the number of days or hours worked.

AUTHORITY: 29 C.F.R. § 541.118(a)(1)

Given _____

Refused ✓

Modified _____

APPENDIX H
PROPOSED INSTRUCTION 17

The primary duty of an exempt executive employee must consist of the management of the enterprise or a subdivision thereof, and includes the customary and regular direction of at least two employees.

AUTHORITY: 29 C.F.R. § 541.1(f)

Given ____

Refused ✓

Modified ____

APPENDIX I
PROPOSED INSTRUCTION 18

The records which must be maintained for exempt executive employees are full name, employee identification number, home address, date of birth, sex and occupation, time of day and day of week exempt employee's workweek begins, total wages paid, date of payment, and pay period covered.

AUTHORITY: 29 C.F.R. § 516.3

Given _____

Refused ✓

Modified _____

APPENDIX J
PROPOSED INSTRUCTION 22

The Court has taken judicial notice of the following, and you are directed to accept the same as true:

(1) The existence of I.C. 36-8-4-8

(2) The repeal of i.C. 22-2-1-1 through I.C. 22-2-1-4

(3) The existence of the Fair Labor Standards Act

(4) The existence of the regulations explaining the Fair Labor Standards Act

-

Given _____

Modified _____

Refused ✓

APPENDIX K
29 U.S.C. 213(a)(1)

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to

(1) any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary. . .)

APPENDIX L
SALARY BASIS
29 C.F.R. § 541.118

(a) An employee will be considered to be paid on a salary basis within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in he performs no work.

...

(2) Deductions may be made, however, when the employee absents

himself from work for a day or more for personal reasons, other than for sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability . . . . if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. . . .

...

(6) . . . . where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered

to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

...

(b) . . . the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment.